

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING
Rules I through IV and the amendment)	ON PROPOSED ADOPTION
of ARM 37.82.101 pertaining to)	AND AMENDMENT
Medicaid eligibility)	

TO: All Interested Persons

1. On June 2, 2008, at 11:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the Sapphire Room, 2401 Colonial Drive, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process (including reasonable accommodations at the hearing site) or who need an alternative accessible format of this notice. If you need an accommodation, contact the department no later than 5:00 p.m. on May 27, 2008. Please contact Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210; telephone (406)444-4094; fax (406)444-1970; e-mail dphhslegal@mt.gov.

3. The rules as proposed to be adopted provide as follows:

RULE I RESOURCE EXCLUSIONS: FAMILY MEDICAID FOR
NONINSTITUTIONALIZED CATEGORICALLY NEEDY CHILDREN AND FAMILIES

(1) In determining eligibility for noninstitutionalized categorically needy children and families under the family Medicaid coverage groups in regard to the factor of resources, no exclusions will be applied to any property that is not owned by a member of the filing or assistance unit. No exclusion will be applied to any property that is owned or held by any entity, including but not limited to a trust or corporation, limited liability company, or any other legal entity, instrument, device, or arrangement of any kind, under which a member of the filing or assistance unit does not own the property.

AUTH: 53-6-113, MCA
IMP: 53-6-131, MCA

RULE II RESOURCE EXCLUSIONS: AGED, BLIND, AND DISABLED
MEDICAID FOR NONINSTITUTIONALIZED INDIVIDUALS AND COUPLES (1) In determining eligibility for noninstitutionalized categorically needy individuals and couples under the aged, blind, and disabled Medicaid coverage groups in regard to the factor of resources, no exclusions will be applied to any property that is not

owned by a member of the filing or assistance unit. No exclusion will be applied to any property that is owned or held by any entity, including but not limited to a trust or corporation, limited liability company, or any other legal entity, instrument, device, or arrangement of any kind, under which a member of the filing or assistance unit does not own the property.

AUTH: 53-6-113, MCA
IMP: 53-6-131, MCA

RULE III RESOURCE EXCLUSIONS: MEDICALLY NEEDY COVERAGE FOR NONINSTITUTIONALIZED INDIVIDUALS, COUPLES, AND FAMILIES (1) In determining eligibility for noninstitutionalized medically needy individuals, couples, and families under the family Medicaid and aged, blind, and disabled Medicaid coverage groups in regard to the factor of resources, no exclusions will be applied to any property that is not owned by a member of the filing or assistance unit. No exclusion will be applied to any property that is owned or held by any entity, including but not limited to a trust or corporation, limited liability company, or any other legal entity, instrument, device, or arrangement of any kind, under which a member of the filing or assistance unit does not own the property.

AUTH: 53-6-113, MCA
IMP: 53-6-131, MCA

RULE IV RESOURCE EXCLUSIONS: FAMILY MEDICAID AND AGED, BLIND, AND DISABLED MEDICAID FOR INSTITUTIONALIZED CATEGORICALLY NEEDY AND MEDICALLY NEEDY INDIVIDUALS, COUPLES, AND FAMILIES

(1) In determining eligibility for categorically needy and medically needy institutionalized individuals, couples, and families under the family Medicaid and aged, blind, and disabled Medicaid coverage groups in regard to the factor of resources, no exclusions will be applied to any property that is not owned by a member of the filing or assistance unit. No exclusion will be applied to any property that is owned or held by any entity, including but not limited to a trust or corporation, limited liability company, or any other legal entity, instrument, device, or arrangement of any kind, under which a member of the filing or assistance unit does not own the property.

AUTH: 53-6-113, MCA
IMP: 53-6-131, MCA

4. The rule as proposed to be amended provides as follows. New matter is underlined. Matter to be deleted is interlined.

37.82.101 MEDICAL ASSISTANCE, PURPOSE, AND INCORPORATION OF POLICY MANUALS (1) remains the same.

(2) The department adopts and incorporates by reference the state policy manuals, namely the Family Medicaid Manual and the Aged Blind Disabled (ABD)

Medicaid Manual governing the administration of the Medicaid program dated ~~January~~ July 1, 2008. The Family Medicaid Manual, the ABD Medicaid Manual, and the proposed manual updates are available for public viewing at each local Office of Public Assistance or at the Department of Public Health and Human Services, Human and Community Services Division, 111 N. Jackson Street, Fifth Floor, P.O. Box 202925, Helena, MT 59601-2925. The proposed manual updates are also available on the department's web site at www.dphhs.mt.gov/legalresources/proposedmanualchange.shtml.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-131, 53-6-141, MCA

5. The Montana Medicaid program is a joint federal-state program that pays medical expenses for eligible individuals who have limited income and resources. To qualify for the Montana Medicaid program an individual must meet the eligibility requirements set forth in the Administrative Rules of Montana (ARM), Title 37, chapter 82. Additionally, the Family Medicaid and the Aged, Blind, and Disabled (ABD) Medicaid manuals set forth information about the eligibility requirements for Medicaid that is more detailed than that in the administrative rules. These policy manuals are published by the department primarily to provide guidance to employees of the local offices of public assistance who determine Medicaid eligibility.

ARM 37.82.101 adopts and incorporates by reference the Medicaid policy manuals. By incorporating these manuals into the administrative rules, the department gives interested parties and the public general notice and an opportunity to comment on policies governing Medicaid eligibility. Additionally, as a result of the incorporation of the manuals into the administrative rules, the policies contained in the Family Medicaid manual and the ABD Medicaid manual have the force of law in case of litigation between the department and a Medicaid applicant or recipient concerning the applicant or recipient's Medicaid eligibility.

ARM 37.82.101 currently adopts and incorporates by reference the Medicaid policy manuals effective January 1, 2008. The department proposes to make some revisions to these manuals that will take effect on July 1, 2008. The amendment of ARM 37.82.101 is therefore necessary in order to incorporate into the Administrative Rules of Montana the revised versions of the policy manuals and to permit all interested parties to comment on the department's policies and to offer suggested changes. It is estimated that changes to the Family and ABD Medicaid Manuals could affect 77,438 Medicaid recipients. Manuals and draft manual material are available for review in each local office of public assistance and on the department's web site at www.dphhs.mt.gov. Below is a brief description of the changes being made to the Family Medicaid manual and the ABD Medicaid manual, section by section, along with an explanation of the reasons why these changes are necessary.

The department also proposes to adopt Rules I, II, III, and IV to clarify the existing

policy of the Public Assistance Bureau that in determining eligibility, exclusions may not be applied to any property a filing or assistance unit does not own, and to foreclose any mistaken belief or argument that filing or assistance units may apply exclusions to property they do not own if that property is owned by or held pursuant to some legal entities, instruments, or devices, and not others. In addition to adopting Rules I, II, III, and IV to state specifically that exclusions in eligibility determinations will not apply to property a filing or assistance unit does not own, it is also necessary to revise Sections 400, 401-1, 402-1, 402-3, and 503-1 in both the Family Medicaid manual and the ABD Medicaid manual to clarify this policy, as described below.

No fiscal impact is anticipated from these changes, unless specifically noted below.

The following is an explanation of changes being made to the ABD and Family Medicaid manuals:

ABD Medicaid Manual

MA 008 Life Expectancy Table This section contains a life expectancy table that shows how much longer, on average, a male or female of a particular age can be expected to live. This table is used when it is necessary to know the life expectancy of a Medicaid applicant or recipient to determine eligibility. For example, the table is used to determine if an annuity is actuarially sound, that is, whether the applicant or recipient can be expected to live long enough to receive payments equal to the amount paid for the annuity. If, using the life expectancy tables, an annuity is found not to be actuarially sound, the purchase of the annuity may be treated as an uncompensated transfer of assets. This section is being updated to replace the current table with a more accurate table, as the current table has not been updated in at least ten years and shows only life expectancy at ten year intervals for persons aged 0 through 60 years and 90 through 110 years. The new table dated April 6, 2006 is used by the Social Security Administration and includes life expectancies for all ages in annual increments for ages 0 through 119.

MA 400 Resources Overview This section sets forth general policies for evaluating resources of applicant and recipients. The general rule is that all resources are countable unless specifically excluded by a regulation, rule, or manual provision. This section is now being amended to add a provision that no exclusions will be applied to property a filing or assistance unit does not own and specifying that this includes but is not limited to property which is owned by or held in any kind of trust, corporation, partnership, limited liability company, or other legal entity, instrument, device, or arrangement. The policy of limiting exclusions to property owned by the filing or assistance unit is a logical and simple "bright line" test for determining when exclusions apply that will be easy for eligibility specialists to administer and thus will prevent errors and inconsistent application of exclusions. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been

suggested in the course of litigation that exclusions can be applied to property held in trust for the benefit of a household member or to other property not owned by a household member. This provision clarifies rather than changes existing policy, although the current version of the ABD Medicaid manual may have inadvertently suggested that exclusions could be applied to property owned by limited liability companies. The department proposes to make changes to Sections 402-1 and MA 503-1 to eliminate the erroneous implication that exclusions may apply to property owned by limited liability companies and partnerships, which has never been the department's intention.

MA 401-1 Resources Ownership/Accessibility/Equity Value This section discusses, among other things, policies for determining ownership and accessibility of property and briefly addresses property exclusions. A provision is being added stating that no exclusions will be applied to property a filing or assistance unit does not own and specifying that this includes but is not limited to property which is owned by or held in any kind of trust, corporation, partnership, limited liability company, or other legal entity, instrument, device, or arrangement. As discussed above, this provision clarifies rather than changes existing policy. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property held in trust for the benefit of a household member or to other property not owned by a household member.

MA 402-1 Resources Countable & Excluded This section sets forth the policies used to decide whether property is excluded or counted in determining eligibility. A provision is being added stating that no exclusions will be applied to property a filing or assistance unit does not own and specifying that this includes but is not limited to property which is owned by or held in any kind of trust, corporation, partnership, limited liability company, or other legal entity, instrument, device, or arrangement. This is a logical and simple "bright line" test for determining when exclusions apply that will be easy for eligibility specialists to administer and thus will prevent errors and inconsistent application of exclusions. As discussed above, this provision is necessary to clarify existing policy. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property held in trust for the benefit of a household member or to other property not owned by a household member. Additionally, in the discussion of property essential to self support in this section the department proposes to add language to clarify that resource exclusions do not apply to property owned by limited liability companies, since it has never been the department's intention to apply exclusions to such property.

MA 402-3 Resources, Trust Funds This section currently provides that a revocable trust is an accessible resource when determining Medicaid eligibility. It further provides that a trust created on or after August 11, 1993 is a countable resource if

the trust provides that the trust funds are available under any circumstances, but it does not specify that this applies regardless of whether the trust is revocable or irrevocable. This section is therefore being amended to clarify that, regardless of whether the trust is stated to be revocable or irrevocable, a trust created on or after August 11, 1993 is a countable resource if there are any circumstances under which the trust funds are available. This merely clarifies the policy regarding treatment of trusts set forth in the federal Medicaid statute, 42 USC 1396p(d) and does not represent a change in policy.

Additionally, the examples in this section currently address only accessibility of trust to the beneficiary. Language is being added to clarify that some trusts may be countable to either the beneficiary or the trustor, or both. For example, if a grandmother sets up a revocable trust for her granddaughter, the trust principal may or may not be a countable resource to the granddaughter who is a Medicaid applicant depending on the terms of the trust, and the principal will be a countable resource to the grandmother if she applies for Medicaid because she can obtain the trust funds for her own use by revoking the trust.

Also, this section is being amended to provide that trust income that can be distributed but is instead retained in the trust becomes a countable resource to the beneficiary and/or trustee when retained by the trust. This policy is outlined in 42 USC 1396p(d)(3)(B)(i) but is not currently included in this section.

Statements regarding money withdrawn from a trust being countable income were amended to make it clear that this rule applies only to money withdrawn from inaccessible or excluded trusts, since money withdrawn from an accessible or countable trust would simply be changing the form of the resource from trust assets to cash/savings, etc.

Section 402-3 currently contains a subsection entitled "Self-Sufficiency Trusts of Montana" that discusses the treatment of "pooled trusts" as defined in 42 USC 1396p(d)(4)(B). Pursuant to Section 1396p(d)(4)(B) the Montana Legislature created a nonprofit organization known as the Self-Sufficiency Trust of Montana which administers a pooled trust in Montana for individuals with disabilities. At the time the subsection on pooled trusts was written, the department was not aware of any other entities administering pooled trusts for individuals with disabilities in Montana. It is now necessary to change the name of this subsection to "Pooled Trusts" rather than "Self-Sufficiency Trusts of Montana" because several out-of-state entities may soon be administering different versions of pooled trusts in the state.

The subsection on the exclusion for burial trusts is being amended to state that an individual may not receive exclusion for a burial trust and a prepaid irrevocable funeral agreement at the same time. If a person has a prepaid irrevocable funeral agreement and a burial trust, the burial trust will be a countable asset. This change is being made to close a loophole that would have allowed people to create both prepaid funeral contracts and burial trusts and using the prepaid funeral contract to finance burial while allowing the burial trust holdings to pass to heirs. It is preferable

for the prepaid funeral contract to continue to be excluded rather than the burial trust, because a prepaid funeral contract has no value limit for exemption. A typographical error regarding burial trusts is also being corrected. This subsection currently provides that the exclusion for burial trusts is limited to \$5,000 but also states erroneously in another place that the limit is \$10,000. It has always been the department's policy to exclude only \$5,000 in a burial trust. This correction is being made to clarify that the limit is \$5,000, not \$10,000.

MA 404-6 Pursuing Claims on Property and Estates This section, which is currently designated as "Resources of a Deceased Community Spouse," is being renamed to more accurately describe the content of this section. It is also being moved to the part of the manual addressing resources and renumbered as Section MA 404-6 rather than Section MA 906-1. Section MA 906-1 currently states that an institutionalized spouse must claim the elective share provided in Montana probate law if the institutionalized spouse's husband or wife predeceases the institutionalized spouse and wills part or all of his or her property to someone other than the institutionalized spouse. It has been brought to the department's attention that this section as currently written suggests that this requirement applies only to Medicaid recipients who are institutionalized and suggests that the only type of claim the Medicaid recipient is required to assert is the right to an elective share. Additionally, it does not specify that individuals applying for Medicaid as well as individuals already receiving Medicaid are required to assert claims. This section was never intended to limit the duty to assert claims to property in this way.

The department therefore proposes to amend this section to state the policy it originally intended to implement. As amended this section will state that all individuals who are either applying for or receiving Medicaid nursing home/institutional benefits or Home and Community Based Waiver (Waiver) benefits are required to assert not only a claim to an elective share where applicable but also to assert any legal claims necessary to obtain assets or income to which the individual may be entitled, which includes but is not limited to the elective share of a surviving spouse and a homestead or family allowance. This section is further being amended to state specifically that failure or refusal to assert such legal claims will be considered an uncompensated transfer of assets. This policy is based on the provisions regarding uncompensated transfers of assets in 42 USC 1396p(c) and the definition of assets in 42 USC 1396p(e)(1), which defines the term "assets" to include any income or assets which the individual is entitled to but does not receive because of an action by the individual. The Centers for Medicare and Medicaid Services, the federal agency that administers the Medicaid program, considers a failure to act to be an action within the meaning of 42 USC 1396p(e)(1). See *The State Medicaid Manual* published by CMS, Section 3257, Subsec. B, examples. See also *Tannler v. State Dep't. of Health and Social Services*, 211 Wis.2d 179, 564 N.W.2d 735, 1997 Wisc. LEXIS 82 (Wisc. Sup. Ct. 1997). Thus, an applicant or recipient's failure to assert a claim to an elective share or assert a claim to any property the applicant or recipient is entitled to receive constitutes an uncompensated transfer of assets.

MA 503-1 Self Employment Income This section defines what constitutes self employment and discusses the treatment of self employment income and resources related to self employment. It discusses corporations and limited liability companies but currently does not address the exclusion of resources owned by a corporation, limited liability company, or partnership. The department proposes to add provisions that resources owned by a corporation, limited liability company, or partnership cannot be excluded as necessary for self employment by virtue of the fact that no exclusions will be applied to property a filing or assistance unit does not own. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property owned by a corporation or other business entity rather than by a household member. This is a logical and simple "bright line" test for determining when exclusions apply that will be easy for eligibility specialists to administer and thus will prevent errors and inconsistent application of exclusions.

This provision clarifies rather than changes existing policy, although the current version of the ABD Medicaid manual inadvertently suggested that exclusions could be applied to limited liability companies. The department proposes to amend MA 503-1 to eliminate the erroneous implication that exclusions could be applied to property owned by limited liability companies and partnerships, which has never been the department's intention.

Additionally, Section MA 503-1 lists some types of business entities or structures which may constitute self employment, such as sole proprietorships and independent contractor. This list of self employment structures currently includes partnerships. The department now proposes to remove partnerships from the list of self employment structures and to provide that partnerships will be treated like corporations and limited liability companies rather than as self employment enterprises. These changes are necessary because an individual who works for a partnership is employed by the partnership, a business entity, not by himself or herself, and hence partnerships should not have been listed as a type of self employment structure. The Department has determined that partnerships are more similar to corporations and limited liability companies than they are to sole proprietorships, and thus they should not be treated as self employment enterprises.

MA 402-3 Trust Funds This section currently provides that a revocable trust is an accessible resource when determining Medicaid eligibility. It further provides that a trust created on or after August 11, 1993 is a countable resource if the trust provides that the trust funds are available under any circumstances, but it does not specify that this applies regardless of whether the trust is revocable or irrevocable. This section is therefore being amended to clarify that, regardless of whether the trust is stated to be revocable or irrevocable, a trust created on or after August 11, 1993 is a countable resource if there are any circumstances under which the trust funds are available. This merely clarifies the policy regarding treatment of trusts set forth in the federal Medicaid statute, 42 USC 1396p(d), and does not represent a change in

policy.

Additionally, the examples in this section currently address only accessibility of trust to the beneficiary. Language is being added to clarify that some trusts may be countable to either the beneficiary or the trustor, or both. For example, if a grandmother sets up a revocable trust for her granddaughter, the trust principal may or may not be a countable resource to the granddaughter who is a Medicaid applicant depending on the terms of the trust. Additionally, the principal will be a countable resource to the grandmother if she applies for Medicaid because she can obtain the trust funds for her own use by revoking the trust.

Also, this section is being amended to provide that trust income that can be distributed but is instead retained in the trust becomes a countable resource to the beneficiary and/or trustee when retained by the trust. This policy is outlined in 42 USC 1396p(d)(3)(B)(i) but is not currently included in this section.

Statements regarding money withdrawn from a trust being countable income were amended to make it clear that this rule applies only to money withdrawn from inaccessible or excluded trusts, since money withdrawn from an accessible or countable trust would simply be changing the form of the resource from trust assets to cash/savings, etc.

MA 703-1 Medical Expense Option This section is being amended to specify that institutional medical expenses incurred while a patient is ineligible for institutional Medicaid coverage due to the application of an uncompensated asset transfer penalty period may not be used to offset an incurment nor used as an incurred medical expense to offset income in an institutional post-eligibility treatment of income determination. The Centers for Medicare and Medicaid Services recommended that state Medicaid agencies implement this policy after enactment of the Deficit Reduction Act of 2005, in a Regional Medicaid Letter dated April 17, 2006.

MA 903-1 Resource Assessments (for Residential Medical Institutions) The federal Medicaid statute at 42 USC 1396r-5 prescribes special rules for the treatment of income and resources in making the initial determination of Medicaid eligibility for married individuals who reside in a nursing home or other medical institution. Section 1396r-5(c)(1) provides that a resource assessment must be conducted listing all resources owned by the institutionalized individual, known as the institutionalized spouse, and by the institutionalized spouse's husband or wife, known as the community spouse. A share of the couple's combined countable resources is then allocated to the community spouse to provide for the community spouse's needs. This share is known as the community spouse resource maintenance allowance and is not counted in determining whether the institutionalized spouse's resources are below the \$2,000 resource limit for eligibility. Section MA 903-1 sets forth the procedures and policies for conducting the resource assessment and determining what amount of resources is allocated to the community spouse.

Resources that are owned individually by either the institutionalized spouse or community spouse or jointly by the institutionalized spouse and community spouse are counted in determining their combined countable resources, as provided in 42 USC 1396r-5(c)(1) and (2). After the institutionalized spouse has been determined eligible for Medicaid the institutionalized spouse has 90 days to transfer his or her interest in any property that was allocated to the community spouse as part of the community spouse resource maintenance allowance to the community spouse. Section 903-1 currently states that if any resources owned by the institutionalized spouse that are part of the community spouse resource maintenance allowance are not transferred out of the institutionalized spouse's name within 90 days, one-half of the couple's combined resources would then be counted as resources of the institutionalized spouse. The requirement automatically to count one-half of their combined countable resources as available to the institutionalized spouse regardless of how much of the property is owned by the institutionalized spouse conflicts with the federal Medicaid statute, 42 USC 1396r-5(c)(4), which mandates that the institutionalized spouse be treated as an individual, not as part of a couple, after Medicaid eligibility has been determined. Under the federal statute, only resources owned by the institutionalized spouse, not half of the combined resources of the institutionalized spouse and the community spouse, should be counted after the institutionalized spouse has initially been determined eligible. It is therefore necessary to revise MA 903-1 to conform with federal law by changing it to say that after the 90 day period for transfer of ownership has passed only the countable resources owned by the institutionalized spouse will be counted instead of one-half the couple's combined countable resources being counted regardless of ownership.

MA 1001-1 Resource Assessments (for Home & Community-Based Services/Waiver) As discussed in regard to Section MA 903-1 *Resource Assessments (for Residential Medical Institutions)*, above, 42 USC 1396r-5 prescribes special rules for the treatment of income and resources in making the initial determination of Medicaid eligibility for married individuals who reside in a nursing home or other medical institution. The provisions of 42 USC 1396r-5 apply also to married individuals who apply for or are receiving the Home and Community Based Waiver benefits instead of living in a nursing home or medical institution. Thus, a resource assessment must be conducted and a share of the couple's combined countable resources will be allocated to the spouse who is not receiving Waiver benefits (the nonwaiver spouse). Section MA 1001-1 sets forth the procedures and policies for conducting the resource assessment and determining what amount of resources is allocated to the nonwaiver spouse.

After the waiver spouse has been determined eligible for Medicaid the waiver spouse has 90 days to transfer his or her interest in any property that was allocated to the nonwaiver spouse as part of the resource maintenance allowance to the nonwaiver spouse. Section 1001-1 currently states that if any resources owned by the waiver spouse that are part of the resource maintenance allowance are not transferred out of the waiver spouse's name within 90 days, one-half of the couple's combined resources will then be counted as resources of the waiver spouse.

The requirement automatically to count one-half of their combined countable resources as available to the waiver spouse regardless of how much of the property is owned by the waiver spouse conflicts with the federal Medicaid statute, 42 USC 1396r-5(c)(4), which mandates that the waiver spouse be treated as an individual, not as part of a couple, after Medicaid eligibility has been determined. Under the federal statute, only resources owned by the waiver spouse, not half of the combined resources of the waiver spouse and the community spouse, should be counted after the waiver spouse has initially been determined eligible. It is therefore necessary to revise Section MA 1001-1 to conform with federal law by changing it to say that after the 90 day period for transfer of ownership has passed only the countable resources owned by the waiver spouse will be counted instead of one-half the couple's combined countable resources being counted regardless of ownership.

Family Medicaid Manual

FMA 400 Resources Overview This section sets forth general policies for evaluating resources of applicant and recipients. The general rule is that all resources are countable unless specifically excluded by a regulation, rule, or manual provision. This section is now being amended to add a provision that no exclusions will be applied to property a filing or assistance unit does not own and specifying that this includes but is not limited to property which is owned by or held in any kind of trust, corporation, partnership, limited liability company, or other legal entity, instrument, device, or arrangement. The policy of limiting exclusions to property owned by the filing or assistance unit is a logical and simple "bright line" test for determining when exclusions apply that will be easy for eligibility specialists to administer and thus will prevent errors and inconsistent application of exclusions. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property held in trust for the benefit of a household member or to other property not owned by a household member. This provision clarifies rather than changes existing policy, although the current version of the ABD Medicaid manual may have inadvertently suggested that exclusions could be applied to property owned by limited liability companies. The department proposes to make changes to Sections 402-1 and MA 503-1 to eliminate the erroneous implication that exclusions may apply to property owned by limited liability companies and partnerships, which has never been the department's intention.

FMA 401-1 Resources Ownership/Accessibility/Equity Value This section discusses, among other things, policies for determining ownership and accessibility of property and briefly addresses property exclusions. A provision is being added stating that no exclusions will be applied to property a filing or assistance unit does not own and specifying that this includes but is not limited to property which is owned by or held in any kind of trust, corporation, partnership, limited liability company, or other legal entity, instrument, device, or arrangement. As discussed above, this provision

clarifies rather than changes existing policy. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property held in trust for the benefit of a household member or to other property not owned by a household member.

FMA 402-1 Resources Countable & Excluded This section sets forth the policies used to decide whether property is excluded or counted in determining eligibility. A provision is being added stating that no exclusions will be applied to property a filing or assistance unit does not own and specifying that this includes but is not limited to property which is owned by or held in any kind of trust, corporation, partnership, limited liability company, or other legal entity, instrument, device, or arrangement. This is a logical and simple "bright line" test for determining when exclusions apply that will be easy for eligibility specialists to administer and thus will prevent errors and inconsistent application of exclusions. As discussed above, this provision is necessary to clarify existing policy. The manuals do not currently state that exclusions cannot apply to property that a member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property held in trust for the benefit of a household member or to other property not owned by a household member. Additionally, in the discussion of property essential to self support in this section the department proposes to add language to clarify that resource exclusions do not apply to property owned by limited liability companies, since it has never been the department's intention to apply exclusions to such property.

FMA 402-3 Trust Funds This section currently provides that a revocable trust is an accessible resource when determining Medicaid eligibility. It further provides that a trust created on or after August 11, 1993 is a countable resource if the trust provides that the trust funds are available under any circumstances, but it does not specify that this applies regardless of whether the trust is revocable or irrevocable. This section is therefore being amended to clarify that, regardless of whether the trust is stated to be revocable or irrevocable, a trust created on or after August 11, 1993 is a countable resource if there are any circumstances under which the trust funds are available. This merely clarifies the policy regarding treatment of trusts set forth in the federal Medicaid statute, 42 USC 1396p(d) and does not represent a change in policy.

Additionally, the examples in this section currently address only accessibility of trust to the beneficiary. Language is being added to clarify that some trusts may be countable to either the beneficiary or the trustor, or both. For example, if a grandmother sets up a revocable trust for her granddaughter, the trust principal may or may not be a countable resource to the granddaughter who is a Medicaid applicant depending on the terms of the trust, and the principal will be a countable resource to the grandmother if she applies for Medicaid because she can obtain the trust funds for her own use by revoking the trust.

Also, this section is being amended to provide that trust income that can be distributed but is instead retained in the trust becomes a countable resource to the beneficiary and/or trustee when retained by the trust. This policy is outlined in 42 USC 1396p(d)(3)(B)(i) but is not currently included in this section.

Statements regarding money withdrawn from a trust being countable income were amended to make it clear that this rule applies only to money withdrawn from inaccessible or excluded trusts, since money withdrawn from an accessible or countable trust would simply be changing the form of the resource from trust assets to cash/savings, etc.

Section 402-3 currently contains a subsection entitled "Self-Sufficiency Trusts of Montana" that discusses the treatment of "pooled trusts" as defined in 42 USC 1396p(d)(4)(B). Pursuant to Section 1396p(d)(4)(B) the Montana Legislature created a nonprofit organization known as the Self-Sufficiency Trust of Montana which administers a pooled trust in Montana for individuals with disabilities. At the time the subsection on pooled trusts was written, the department was not aware of any other entities administering pooled trusts for individuals with disabilities in Montana. It is now necessary to change the name of this subsection to "Pooled Trusts" rather than "Self-Sufficiency Trusts of Montana" because several out-of-state entities may soon be administering different versions of pooled trusts in the state.

The subsection on the exclusion for burial trusts is being amended to state that an individual may not receive exclusion for a burial trust and a prepaid irrevocable funeral agreement at the same time. If a person has a prepaid irrevocable funeral agreement and a burial trust, the burial trust will be a countable asset. This change is being made to close a loophole that would have allowed people to create both prepaid funeral contracts and burial trusts and using the prepaid funeral contract to finance burial while allowing the burial trust holdings to pass to heirs. It is preferable for the prepaid funeral contract to continue to be excluded rather than the burial trust, because a prepaid funeral contract has no value limit for exemption. A typographical error regarding burial trusts is also being corrected. This subsection currently provides that the exclusion for burial trusts is limited to \$5,000 but also states erroneously in another place that the limit is \$10,000. It has always been the department's policy to exclude only \$5,000 in a burial trust. This correction is being made to clarify that the limit is \$5,000, not \$10,000.

FMA 503-1 Self Employment Income This section defines what constitutes self employment and discusses the treatment of self employment income and resources related to self employment. It discusses corporations and limited liability companies but currently does not address the exclusion of resources owned by a corporation, limited liability company, or partnership. The department proposes to add provisions that resources owned by a corporation, limited liability company, or partnership cannot be excluded as necessary for self employment by virtue of the fact that no exclusions will be applied to property a filing or assistance unit does not own. The manuals do not currently state that exclusions cannot apply to property that a

member of the household does not own because the department considered this to be self evident. It is now necessary to add a provision stating this policy because it has been suggested in the course of litigation that exclusions can be applied to property owned by a corporation or other business entity rather than by a household member. This is a logical and simple "bright line" test for determining when exclusions apply that will be easy for eligibility specialists to administer and thus will prevent errors and inconsistent application of exclusions.

This provision clarifies rather than changes existing policy, although the current version of the ABD Medicaid manual inadvertently suggested that exclusions could be applied to limited liability companies. The department proposes to amend MA 503-1 to eliminate the erroneous implication that exclusions could be applied to property owned by limited liability companies and partnerships, which has never been the department's intention.

Additionally, Section MA 503-1 lists some types of business entities or structures which may constitute self employment, such as sole proprietorships and independent contractor. This list of self employment structures currently includes partnerships. The department now proposes to remove partnerships from the list of self employment structures and to provide that partnerships will be treated like corporations and limited liability companies rather than as self employment enterprises. These changes are necessary because an individual who works for a partnership is employed by the partnership, a business entity, not by himself or herself, and hence partnerships should not have been listed as a type of self employment structure. The department has determined that partnerships are more similar to corporations and limited liability companies than they are to sole proprietorships, and thus they should not be treated as self employment enterprises.

6. The department intends the adoption and amendment to be applied effective July 1, 2008.

7. Interested persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on June 5, 2008. Comments may also be faxed to (406)444-1970 or e-mailed to dphhslegal@mt.gov. The department maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. To be included on such a list, please notify this same person or complete a request form at the hearing.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of this notice conform to the official version of the notice as printed in the Montana Administrative Register, but advises all concerned persons that, in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text

will be considered. The web site may be unavailable at times, due to system maintenance or technical problems.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

10. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct the hearing.

/s/ Barbara Hoffmann
Rule Reviewer

/s/ Joan Miles
Director, Public Health and
Human Services

Certified to the Secretary of State April 28, 2008.